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JUN 23 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1208234

Kimberly Odom, Appellant,

vs.

Carolinas Hospital System, Employer, and
Indemnity Insurance Company of NA, Carrier, Respondents.

APPELLANT'S RETURN TO RESPONDENTS' PETITION FOR REHEARING

The Appellant by and through the undersigned counsel hereby opposes the Respondents' Petition for Rehearing as follows:

STATEMENT OF THE CASE

This is a Workers' Compensation case. The Claimant sustained an admitted injury by accident to her spine on June 20, 2012. The Employer admitted injury to her back with radiating symptoms affecting her left leg, paid temporary total disability benefits, and provided medical treatment including the insertion of a spinal cord stimulator. By Consent Order of March 18, 2014, the parties resolved the indemnity portion of the claim.

Thereafter, the Claimant filed a change of condition claim, pursuant to S.C. Code §42-17-90 and Estridge v. Joslyn Clark Controls, 325 S.C. 532 (Ct. App. 1997), alleging that the Claimant was no longer at maximum medical improvement as she had manifested psychological symptoms as a product of her back injury.

By Order of June 28, 2016, the Single Commissioner found that the Claimant had suffered a change in condition and was no longer at maximum medical improvement. (See Order p. 12, Rulings of Law No. 3 and No. 4).

With regard to temporary total disability benefits the Single Commissioner found:

23. **Given that no physician has removed the Claimant from work with regard to the worsening of her psychological condition**, the issue as to Claimant's entitlement to temporary total disability benefits due to and caused by the Claimant's change of condition is premature at this time and reserved for further determination. (06/28/16 Order p. 12, Finding 23). (Emphasis added).

The Claimant appealed to the Workers' Compensation Commission Appellate Panel, which affirmed. (12/30/16 Order, pp. 10-11, Finding 23).

This appeal followed.

The Respondents Moved to Dismiss the appeal, arguing that "Because the Commissioner reserved the issue of TTD for further determination, the Commission's order is not a final decision and therefore, is not immediately appealable." (Respondents' Brief, p. 4-5).

This Court denied the Respondent's Motion to Dismiss the Appeal. On June 14, 2017 the Respondent's filed a Petition for Rehearing.

ARGUMENT

I. This Court's Rules do not allow for Petitions for Rehearing on a Motion or a Petition

unless the action of the Court has the effect of dismissing the parties appeal.

Rule 221(c) of the South Carolina Appellate Court rules provides:

- (c) Rehearing of Motions. The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal.

This Court denied the Respondent's Motion to Dismiss and ordered the Respondents to brief the merits of the appeal. Pursuant to Rule 221 (c) this Court should not entertain the Respondent's Petition for Rehearing.

II. The Commission erroneously and finally denied the Appellant's current entitlement to temporary total disability benefits; refusing to consider her physical restrictions.

The Respondent's Petition for Rehearing, like their Motion to Dismiss, ignores the fact that the Commission denied the Appellant's current entitlement to temporary total disability benefits; refusing to consider her physical restrictions. The Respondents insist, as they did in their Motion to Dismiss, that the issue of temporary total disability benefits has been held in abeyance. They argue:

In Appellant's Notice of Appeal, Appellant indicates the issue on appeal is whether the Commission erred in failing to award TTD benefits. However, the Commission expressly noted that any finding regarding TTD **regarding Appellant's psychological condition** would be premature at that time, since she was not on any restrictions **for her psychological condition** at the time of the hearing. It is clear from the Commission's order that this is not a final decision because the Commission retained jurisdiction to make a later determination of TTD and has jurisdiction to determine when Appellant reaches MMI **for the worsened psychological condition**. Accordingly, the Commission's decision was not immediately appealable. (Respondents' Petition for Rehearing, p. 8)(Emphasis added).

The Respondents insist that the Commission held in abeyance the issue of the Claimant's entitlement to temporary total disability benefits "regarding Appellant's psychological condition" and

her restrictions “for her psychological condition” and whether she has reached MMI for “for the worsened psychological condition”.

However, they ignore the fact that the issue before this Court is whether the Commission erred in denying the Appellant’s entitlement to temporary total benefits; refusing to consider the Claimant’s physical restrictions.

Contrary to Respondent’s assertion, the Commission did not find that the “Appellant has not reached maximum medical improvement **for her psychological condition**”. (Respondent’s Petition for Rehearing, p. 4)(Emphasis added). Instead, the Commission found that the Appellant had not reached maximum medical improvement, period. (Commission Order, p. 11, paragraph 4). Indeed, the Worker’s Compensation Commission found that the Claimant’s psychological symptoms were, themselves, the product of her physical back injury. (See Appellant Panel Order, p. 10, paragraph 18).

The Worker’s Compensation Commission further found that the manifestation of the Claimant’s psychological symptoms as the result of her back injury properly formed the basis of a change of condition claim as they were symptoms which were present and causally connected but found not to impact on the Claimant’s condition at the time of original award, but later manifested themselves in full bloom. (See Commission Order, p. 9, paragraph 14)(citing Estridge v. Joslyn Clark Controls, 325 S.C. 532, 540 (Ct. App. 1997)).

The Appellant argues that the Commission erred in separating one symptom of the Claimant’s admitted back injury (depression) from another (physical pain). That is to say, the Commission improperly refused to consider physical restrictions that prevented the Claimant from performing her job when determining the Claimant’s current eligibility for temporary total disability benefits.

This precise issue was finally and erroneously decided by the Commission and is the proper subject of this appeal.

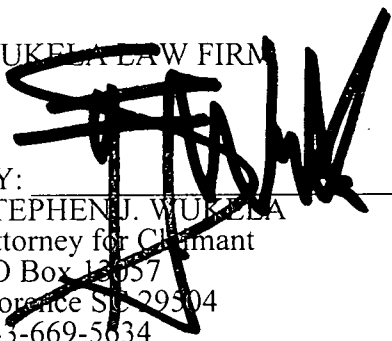
The Respondents cite the Order of this Court in the case of Cook v. Spartanburg Steel Products, Inc., App. Case No. 2014-001372, as contrary to the finding of the Court in this case. The Respondents ignore the fact that, in Cook, the issues of temporary total disability and permanency were held in abeyance by agreement of the parties, and the only issue before the Commission, in Cook, was whether the Claimant had sustained a change of condition. The Cook Court found that the Commission's Order was not immediately appealable because the issues of temporary total disability and permanency were held in abeyance.

However, here, unlike in Cook, the issue of temporary total disability was squarely before the Commission. Here the Commission refused to consider the Claimant's physical restrictions in denying the Claimant's current entitlement to temporary total disability benefits. While the Commission held in abeyance the question of whether the Claimant might, in the future, have psychological restrictions that prevented her from working and whether she might be entitled to temporary total disability at some future time, on that basis, that does not change the fact that the Commission finally and erroneously decided to refuse to consider the Claimant's physical restrictions in denying the Claimant current temporary total disability benefits. That decision is ripe for review by this Court.

For the foregoing reasons, the Respondent's position for rehearing should be denied.

Respectfully Submitted,

WUKELA LAW FIRM

BY: 
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Attorney for Claimant
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Florence, South Carolina
June 2017, 2017

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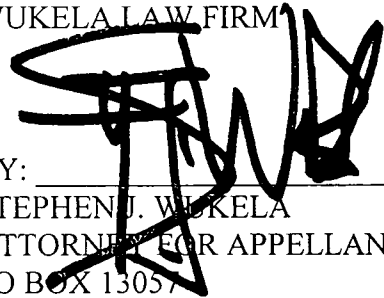
vs.

Carolinas Hospital System, Employer, and
Indemnity Insurance Company of NA, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Return to Respondents' Petition for Rehearing on Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on June 22, 2017, addressed to their attorney of record, Christian Stegmaier, at his office at Collins and Lacy, PO Box 12487, Columbia, SC 29211.

WUKELA LAW FIRM



BY: _____
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June 22, 2017

RECEIVED

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia SC 29201

Re: Kimberly Odom v. Carolinas Hospital System, and Indemnity Insurance
Company of NA
File No. 2017-000148

Dear Ms. Kitchings:

Enclosed please find for filing the following:

1. Unbound Original and Six (6) copies of Appellant's Return to Respondents' Petition for Rehearing;
2. Proof of Service of the Appellant's Return to Respondents' Petition for Rehearing on the Respondent.
3. Unbound Original and Six (6) copies of Appellant's Motion to Strike Portions of Respondents' Petition for Rehearing and Portions of Respondents' Motion to Dismiss
4. Proof of Service of the Appellant's Motion to Strike Portions of Respondents' Petition for Rehearing and Portions of Respondents' Motion to Dismiss
5. My office check in the amount of \$25.00.

By copy of this letter, I am serving Respondents' counsel, Christian Stegmaier, with a copy of the Appellant's Return to Respondents' Petition for Rehearing and the Appellant's Motion to Strike Portions of Respondents' Petition for Rehearing and Portions of Respondents' Motion to Dismiss.

With kind regards, I am

Yours truly

WUKELA LAW FIRM

STEPHEN J. WUKELA

SJW:bjm
Enclosures
cc: Christian Stegmaier, Esquire